

INFORMATION SHEET  
 DETERMINATIONS OF NO JURISDICTION FOR ISOLATED, NON-NAVIGABLE, INTRA-STATE WATERS RESULTING  
 FROM U.S. SUPREME COURT DECISION IN SOLID WASTE AGENCY OF NORTHERN COOK COUNTY  
 V. U.S. ARMY CORPS OF ENGINEERS

DISTRICT OFFICE: Philadelphia

FILE NUMBER: CENAP-OP-R-200501120

REGULATORY PROJECT MANAGER: Kevin W. Dougherty Date: March 14, 2006

PROJECT REVIEW/DETERMINATION COMPLETED: In the office N (Y/N) Date: \_\_\_\_\_  
 At the project site Y (Y/N) Date: October 04, 2005

PROJECT LOCATION INFORMATION:

State: Pennsylvania

County: Lehigh

Center coordinates of site by latitude & longitudinal coordinates: 40-31-9.58 N 75-28-7.83 W

Approximate size of site/property (including uplands & in acres): 24.74

Name of waterway or watershed: Saucon Creek (Lehigh River)

SITE CONDITIONS:

Type of aquatic resource <sup>1</sup>	0-1 ac	1-3 ac	3-5 ac	5-10 ac	10-25 ac	25-50 ac	> 50 ac	Linear feet	Unknown
Lake	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
River	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Stream	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Dry Wash	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Mudflat	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sandflat	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Wetlands	0.081 ac	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Slough	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Prairie pothole	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Wet meadow	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Playa lake	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Vernal pool	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Natural pond	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other water (identify type)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
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<sup>1</sup>Check appropriate boxes that best describe type of isolated, non-navigable, intra-state water present and best estimate for size of non-jurisdictional aquatic resource area.

Migratory Bird Rule Factors <sup>1</sup> :	If Known		If Unknown Use Best Professional Judgment		
	Yes	No	Predicted to Occur	Not Expected to Occur	Not Able To Make Determination
Is or would be used as habitat for birds protected by Migratory Bird Treaties?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Is or would be used as habitat by other migratory birds that cross state lines?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is or would be used as habitat for endangered species?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is used to irrigate crops sold in interstate commerce?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

<sup>1</sup>Check appropriate boxes that best describe potential for applicability of the Migratory Bird Rule to apply to onsite, non-jurisdictional, isolated, non-navigable, intra-state aquatic resource area.

TYPE OF DETERMINATION: Preliminary ☐ Or Approved ☒ .

ADDITIONAL INFORMATION SUPPORTING NJD (e.g., paragraph 1 – site conditions; paragraphs 2-3 – rationale used to determine NJD, including information reviewed to assess potential navigation or interstate commerce connections; and paragraph 4 – site information on waters of the U.S. occurring onsite):

## 1. SITE CONDITIONS

a. The property consists of a mixture of a fallow agricultural field, upland hedgerows and woodlots underlain by well drained (Washington and Chester Series) and moderately well drained (Bedford, Glenville, and Philo) soils and a riparian woodlot along the valley of a small unnamed tributary to Saucon Creek (UNT 1). There are no structures on the site. Surrounding land use is rural residential and agricultural to the south, west and east; and a recent residential development to the north. Review of the aerial photography in the Soil Survey for Lehigh County Pennsylvania (1963) shows that nearly the entire tract was cultivated at the time of the base photography (1958). The UNT 1 located along the southwestern edge of the property is identified on the annotated 1958 Soil Survey photography but no other drainage features are identified on the property. Review of 1990 stereo pairs found that there was drainage from the subject property flowing east along a swale line but there was no evidence of a channel with an OHW.

b. Topographically the property lies on the lower slope of the southern side of South Mountain. The property is a rolling concave-convex hillside that slopes from northwest to southeast. On the southern tract edge, the land slopes steeply down into the valley of the unnamed UNT 1.

c. Three wetlands are identified on the site according to the criteria of the 1987 Corps of Engineers Wetland Delineation Manual. Two streams are also identified; these are UNT 1 and an ephemeral channel (UNT 2) connecting one of the wetland areas located at the southern edge of the agricultural field to UNT 1. The jurisdictional wetlands include the area at the head of UNT 2 and those wetlands contiguous to the channel of UNT 1. As UNT 1 and UNT 2 are part of the surface tributary system of a Water of the United States (see JDIS form) all wetlands contiguous with these streams are adjacent wetlands and are also part of the surface tributary system of a water of the United States (see JDIS form). One 0.081 acre area of palustrine emergent wetland located adjacent to Brunner Road is isolated and without a nexus to interstate or foreign commerce and therefore is not a water of the United States.

## 2. RATIONALE FOR DETERMINATION

a. The excluded area is a small (0.081 acre) slope and depression located at the edge of Brunner Road and forming part of the head of concave slope. Based on the field data, the area is a seasonally saturated slope that is connected to a broad but shallow swale that extends to the northeast. An erosion rill has formed in the eastern portion of the swale but this rill dissipates into sheet flow before reaching the driveway and hedgerow on the northeastern side of the property. As such the wetland has no surface connection to any part of the surface tributary system of a water of the United States. At its closest point, the wetland is approximately 1300 feet from UNT 1 and 1000 feet from UNT 2. Based upon the lack of physical connection with either stream and the distance from either tributary, the wetland is not contiguous with or adjacent to a water of the United States and therefore is an isolated intrastate wetland.

b. To determine if jurisdiction could be asserted the following factors were considered:

1. The area has no permanent standing water and could not support any type of vessel. The area is therefore not navigable in fact.
2. The small size of the wetland and the lack of any unusual properties make it unlikely that the wetland could be used for recreational, educational, or scientific use by interstate or foreign travelers (33 CFR 328.3 (a)(3)(i)) and there is no record of such use. The wetland supports neither fish nor shellfish and water from it could be used neither to irrigate crops nor for industrial or commercial processes that could produce goods sold or transported in interstate or foreign commerce (33 CFR 328.3 (a)(3)(iii)). The wetland does not contain merchantable timber, there are no known mineral deposits, and the area does not contain sand or gravel deposits that could be extracted and sold in interstate or foreign commerce (33 CFR 328.3 (a)(3)(iii)).

c. Based upon the factors considered above, the wetland is an isolated, intrastate wetland with no nexus to interstate or foreign commerce. As such, pursuant to 33 CFR 328.3, it is not a water of the United States, and is not subject to Section 404 of the CWA.

## 3. WATERS OF THE UNITED STATES

a. Waters on the site include an unnamed perennial tributary (UNT 1) and an unnamed ephemeral tributary (UNT 2) to Saucon Creek. There are wetlands contiguous with, or neighboring, these waters. Saucon Creek is tributary to the Lehigh River, an intrastate navigable water of the United States pursuant to 33 CFR 328.3(a)(1) and 33 CFR 329.4. The Lehigh River is tributary to the Delaware River, an interstate navigable water of the United States pursuant to both 33 CFR 328.3(a)(1) and 33 CFR 329.4. Therefore both the unnamed tributaries to Saucon Creek are part of the surface tributary system of a water of the United States and are themselves waters of the United States pursuant to 33 CFR 328.3(a)(5). Wetlands contiguous with, or neighboring, waters of the United States are adjacent wetlands (33 CFR 328.4); wetlands adjacent to waters of the United States are waters of the United States pursuant to 33 CFR 328.3(a)(7). There is also a 0.081 acre isolated wetland on the site that is not subject to Section 404 jurisdiction, see attached SWANCC decision document.

## 4. OTHER COMMENTS

Several linear features identified from the topographic survey or from aerial photography were examined in the field. These features were found to be either: 1) old roadways including abandoned farm lanes; 2) rock outcrops, stone walls or earth berms; or 3) rills and gullies without a direct surface connection to a water of the United States. The rills and gullies generally originated within the cultivated field and dissipate into sheet flow once they entered unplowed areas or once slopes decreased to less than 3-5%. These rills and gullies are upland erosional features. This determination is supported by examination of aerial photography from 1990 that confirmed the field determinations that with the exception of UNT 1 and UNT 2, there were no other small streams on the property. Earlier photography confirmed that the area has been in agriculture.

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